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No. 91-1671

In The

Supreme Court of the United States

October Term, 1991

WILLIAM J. MERTENS, ALEX W. BANDROWSKI, JAMES A. CLARKE, and RUSSELL FRANZ,

Petitioners,

v.

HEWITT ASSOCIATES, an Illinois Partnership,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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The respondent, Hewitt Associates ("Hewitt"), respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Ninth Circuit's decision in this case. That decision is reported at 948 F.2d 607 (1991) and is reprinted in Petitioners' Appendix ("PA"). (PA1.)

STATEMENT OF THE CASE[1]

This petition arises from the third in a series of actions filed by former Kaiser Steel Corporation ("Kaiser") employees. All of these cases have sought to recover benefits lost when the Pension Benefit Guaranty Corporation ("PBGC") terminated the Kaiser Steel Retirement Plan ("the Plan") in February of 1987, after Kaiser declared bankruptcy.

In an effort to discover a "deep pocket," former Kaiser employees have searched for additional parties to sue. They cannot sue Kaiser because it is bankrupt. They unsuccessfully attempted to sue various fiduciary trustees and administrators of the Plan, alleging that their failure to purchase individual annuities to fund each pension was the cause of the Plan's demise. *Horan v. Kaiser Steel Retirement Plan,* 947 F.2d 1412 (9th Cir. 1991). A separate action currently pending in the district court, filed by the same former Kaiser employees who are Petitioners here, claims that various trustees and administrators breached their fiduciary duties by failing to ensure that the Plan was adequately funded. *Mertens v. Black,* No. CV 88-3587-MHP (N.D. Cal. 1989).

Subsequent to that action, Petitioners brought this case against Hewitt, an employee benefit consulting firm that performed actuarial services for Kaiser during the early 1980s. Petitioners allege that the Plan's financial

[1] Petitioners' Statement of the Case omits a description of related litigation and of portions of their Complaint in this action. Accordingly, Hewitt includes a brief Statement of the Case.

woes were caused, not by the demise of Kaiser or the actions of the trustees and administrators, but by Hewitt's failure to comply with its "professional obligations" under ERISA.[2] The district court dismissed these ERISA allegations for failure to state a claim upon which relief can be granted. The United States Court of Appeals for the Ninth Circuit affirmed that dismissal, and Petitioners filed this petition.

REASONS FOR DENYING THE WRIT

Contrary to Petitioners' assertions, there is no current, real or intolerable conflict among the circuits on the Question Presented by their petition. That question was answered in the negative by Congress when it passed the

[2] Petitioners do not explicitly plead a cause of action for breach of fiduciary duty or knowing participation in a breach of such duty. Instead, their Complaint alleges "Breach of Professional Duties to Plan." (Respondent's Appendix ("RA") at 8.) That count asserts that Hewitt was subject to various ERISA reporting requirements (RA8-10) and that regulations of both the Joint Board of Enrolled Actuaries and the Internal Revenue Service imposed certain standards of professional conduct. (RA10-12.) Petitioners then alleged *only* that Hewitt breached these statutory and regulatory obligations by "either delegat[ing] the responsibility to Kaiser for selecting the Plan's actuarial assumptions or allow[ing] Kaiser to impose its choice of assumptions." (RA12.) It was not until Hewitt moved to dismiss the Complaint that Petitioners argued *for the first time* that their "claim for relief can and should be *construed* to support any of three different claims:" (1) breach of fiduciary duty under ERISA; (2) knowing participation in a breach of fiduciary duty under ERISA; and (3) breach of professional actuarial duties under ERISA. (PA4.)

Omnibus Budget Reconciliation Act of 1989 ("OBRA") without a provision – originally proposed by the drafters – explicitly creating a damage action against non-fiduciaries. *See* H.R. 3299, 101st Cong., 1st Sess. § 3151(e)(6), 135 Cong. Rec. H6006 (daily ed. Sept. 27, 1989). Both the absence of this explicit provision as well as the specific terms of OBRA as enacted disclose a Congressional intent to preclude such actions. Not surprisingly, since the enactment of OBRA, no federal court of appeals has permitted any party to pursue such claims; indeed the two circuits which have considered the issue have expressly rejected such claims. (*See infra* note 3 and accompanying text.)

In addition, none of the purportedly conflicting cases cited by Petitioner consider the impact of this Court's controlling pronouncements. *See, e.g., Massachusetts Mutual Life Ins. Co. v. Russell,* 473 U.S. 134, 146 (1985) (ERISA's "carefully integrated civil enforcement provisions . . . provide strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly"). And, the cases cited by Petitioner are all dated, factually distinguishable determinations which failed to analyze ERISA, its legislative history or decisions of other courts.

I. THERE IS NO CURRENT CONFLICT AMONG THE CIRCUITS ON THE QUESTION PRESENTED BECAUSE NO FEDERAL COURT OF APPEALS HAS ALLOWED A PRIVATE DAMAGES ACTION AGAINST NON-FIDUCIARIES SINCE CONGRESS ENACTED OBRA.

At the time it passed OBRA in 1989, Congress considered and rejected a proposed amendment to ERISA that

would have specifically provided a private cause of action for damages against non-fiduciaries who knowingly participate in a breach of fiduciary duty. *See* H.R. 3299, 101st Cong., 1st Sess. § 3151(e)(6), 135 Cong. Rec. H6006 (daily ed. Sept. 27, 1989). In addition, there is nothing in OBRA as enacted that indicates a contrary Congressional intent.

All of the cases cited by Petitioner which purportedly conflict with the ruling below were decided *before* Congress enacted OBRA. Since that time, only the Ninth and the Eleventh Circuits have considered the issue of whether ERISA provides a damage action against non-fiduciaries, and both courts agree that no such cause of action exists.[3] Accordingly, there is no current conflict among the courts of appeal on this issue.

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[3] *Mertens v. Hewitt Assocs.,* 948 F.2d 607 (9th Cir. 1991); *Useden v. Acker,* 947 F.2d 1563 (11th Cir. 1991). In *Useden,* a profit sharing plan trustee filed suit against a bank which made a loan to the plan and the plan's former lawyers alleging liability based upon alternate theories of breach of fiduciary duties or knowing participation in a fiduciary breach by a non-fiduciary. *Id.* at 1565. The Eleventh Circuit affirmed the district court's summary judgment on the ground that a non-fiduciary cannot be held liable for participating in a fiduciary breach. *Id.* at 1582. *Accord Albert Einstein Medical Care Found. v. National Benefit Fund,* No. 89-5931, 1991 WL 114614 (E.D. Pa. June 21, 1991); *Framingham Union Hosp., Inc. v. Travelers Ins. Co.,* 744 F. Supp. 29 (D. Mass. 1990). *See also Consolidated Beef Indus. v. New York Life Ins.,* 949 F.2d 960, 965 (8th Cir. 1991) ("[t]his court expresses no opinion on the validity of non-fiduciary liability because even under the standards in *Freund,* CBI has not proven NYL is liable as a non-fiduciary"), *cert. denied,* 60 U.S.L.W. 3617 (1992); *Pappas v. Buck Consultants, Inc.,* 923 F.2d

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Petitioners' assertion that OBRA endorses a private cause of action against non-fiduciaries is wrong for several reasons. Most significantly, the argument ignores Congress' express rejection of an amendment to ERISA which would have explicitly created such an action. The proposed amendment provided:

> Any person who participates knowingly in, or knowingly undertakes to conceal, an act or omission of a fiduciary with respect to a plan, knowing such act or omission is a breach of fiduciary responsibility to such plan, shall be personally liable to the plan for such breach of fiduciary responsibility in the same manner and to the same extent as if such person were a fiduciary committing such breach.

H.R. 3299, 101st Cong., 1st Sess. § 3151(e)(6), 135 Cong. Rec. H6006 (daily ed. Sept. 27, 1989). OBRA's legislative history reveals that this section was drafted specifically to overrule *Nieto v. Ecker*, 845 F.2d 868 (9th Cir. 1988), the decision upon which the Ninth Circuit's ruling in this case was based.[4]

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531, 542 (7th Cir. 1991) (pension plan trustee's allegations of "incorrect advice" and "misleading reports" failed to state cause of action against actuary for knowing participation in fiduciary breach).

[4] OBRA's legislative history states:

> [A] divided panel of the Ninth Circuit in *Nieto v. Ecker*, 845 F.2d 868 (9th Cir. 1988) held that the absence of specific language in ERISA creating such a cause of action precluded the Court from ordering

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The deletion of this amendment from the bill enacted into law demonstrates a Congressional intent to prohibit such actions. *See Mackey v. Lanier Collection Agency*, 486 U.S. 825, 837 (1988) ("[o]nce Congress was sufficiently aware of [an issue] – as evidenced by its adoption of [a limited provision on that issue] – Congress' decision to remain silent concerning [the issue] 'acknowledged and accepted the practice, rather than prohibiting it' " (quoting *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 516 (1981))); *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 147 (1985).

Petitioners' argument that a private damages action against non-fiduciaries can be inferred from OBRA's amendment to ERISA's civil enforcement provisions is similarly flawed. OBRA did amend ERISA by adding Section 502(l) which permits the Secretary of Labor to assess a civil penalty – not damages – against non-fiduciaries for knowing participation in a breach of fiduciary duty. 29 U.S.C. § 1132(l). That penalty is equal to "20 percent of the applicable recovery amount" which is subsequently defined as "any amount recovered from a

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> any remedy against a non-fiduciary, except to the extent that the non-fiduciary engaged in a transaction specifically prohibited by section 406 of ERISA as a party in interest. . . . This provision . . . clarif[ies] Congressional intent to codify in ERISA the common law of trusts as it applies to employee benefit plans. The bill's language specifically adopts the familiar trust law doctrine that a knowing participant in a breach of fiduciary duty may be held jointly and severally liable for the loss sustained by a breach of trust in which the knowing participant participates.

H.R. Rep. No. 247, 101st Cong., 1st Sess. 77-78 (1989), *reprinted in* 1989 U.S.C.C.A.N. 1906, 1970.

fiduciary or other person with respect to a breach or violation" pursuant to a settlement or "ordered by a court to be paid by such fiduciary or other person to a plan or its participants and beneficiaries in a judicial proceeding instituted by the Secretary under subsection [502](a)(2) or (a)(5)." 29 U.S.C. § 1132(1)(2).

There is nothing in this definition which suggests a Congressional intent to allow either the Secretary or plan participants to bring damage actions against non-fiduciaries. The fact that a civil penalty may be based upon a recovery from a "fiduciary or other person" does not indicate otherwise. Recovery by the Secretary under Section 502(a)(2) is limited to fiduciaries by the explicit language of the statute. 29 U.S.C. § 1132(a)(2). The Secretary may, however, obtain a recovery from a "fiduciary or other person" in an *equitable* action for restitution under Section 502(a)(5). 29 U.S.C. § 1132(a)(5). A penalty based upon such an *equitable* recovery from an "other person" does not mandate the existence of a damage action by the Secretary (much less by a private plaintiff) against non-fiduciaries.[5]

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[5] Petitioners improperly use Section 502(1) to create a fictional "presumption that the Secretary always had the power to institute litigation against non-fiduciaries" under separate enforcement provisions which are conspicuously silent on the subject. (Petition at 16.) As first enacted in 1974, Section 502(a)(5) authorized the Secretary of Labor to seek equitable relief against anyone, including non-fiduciaries, who violated provisions of the Act. 29 U.S.C. § 1132(a)(5). ERISA did not, however, grant authority for the Secretary to bring damage actions under the same circumstances. Yet, on the basis of their fictional presumption that the Secretary of Labor

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As this Court concluded in *Russell*, "the six carefully integrated civil enforcement provisions found in § 502(a) . . . provide strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly." 473 U.S. at 146. **By providing that non-fiduciaries are liable for equitable remedies (such as restitution) and for penalties, while also authorizing *damage* recoveries only against fiduciaries, Congress limited damage liability to the latter.** Thus, Petitioners have no basis for inferring a private remedy or a private right of action.[6]

II. THE PURPORTEDLY CONFLICTING CIRCUIT DECISIONS CITED BY PETITIONER FAIL TO CONSIDER THE IMPACT OF THIS COURT'S RECENT ERISA DECISIONS ON THE QUESTION PRESENTED.

All of the cases that Petitioners rely on to create an alleged conflict between the circuits either pre-date[7] or

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always had a right to seek monetary damages under ERISA Section 502(a)(5), Petitioners further infer that plan participants must also have both a remedy and therefore a right to recover damages against non-fiduciaries. This layered speculation defies law, logic and common sense.

[6] *See Cort v. Ash*, 422 U.S. 66, 78 (1975). *See also Virginia Bankshares, Inc. v. Sandberg*, 111 S.Ct. 2749, 2763 (1991) ("recognition of any private right of action for violating a federal statute must ultimately rest on congressional intent to provide a *private remedy*" (emphasis added)).

[7] *Thornton v. Evans*, 692 F.2d 1064 (7th Cir. 1982).

ignore (and do not even cite)[8] this Court's decision in *Massachusetts Mutual Life Insurance Co. v. Russell,* 473 U.S. 134 (1985). Prior to *Russell,* this Court had not considered the scope of ERISA enforcement. Although the Court had generally recognized that ERISA is a "comprehensive and reticulated statute"[9] "designed to promote the interests of employees and their beneficiaries in employee benefit plans,"[10] the Court had not addressed the application of these principles to ERISA's enforcement provisions.

In *Russell,* this Court rejected the argument that a plan beneficiary had a private right of action to recover extra-contractual damages against a plan administrator for improperly processing benefit claims.[11] *Id.* at 148. In so holding, the Court emphasized that " '[t]he federal judiciary will not engraft a remedy on a statute, no matter how salutary, that Congress did not intend to provide.' " *Id.* at 145 (quoting *California v. Sierra Club,* 451 U.S. 287, 297 (1981)).

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[8] *Brock v. Hendershott,* 840 F.2d 339 (6th Cir. 1988); *Whitfield v. Lindemann,* 853 F.2d 1298 (5th Cir. 1988), *cert. denied sub nom. Klepak v. Dole,* 490 U.S. 1089 (1989); *Lowen v. Tower Asset Management, Inc.,* 829 F.2d 1209 (2d Cir. 1987); *Fink v. National Savings & Trust Co.,* 772 F.2d 951 (D.C. Cir. 1985).

[9] *Nachman Corp. v. Pension Benefit Guaranty Corp.,* 446 U.S. 359, 361 (1980).

[10] *Shaw v. Delta Air Lines, Inc.,* 463 U.S. 85, 90 (1983).

[11] Although the holding in *Russell* was limited to the recovery of extra-contractual damages against fiduciaries under Section 409(a), (*id.* at 139 n.5), the reasoning is equally applicable to the recovery of damages against non-fiduciaries under Section 502(a)(3).

After thoroughly analyzing ERISA's legislative history, the Court was "reluctant to tamper with an enforcement scheme crafted with such evident care as the one in ERISA." *Id.* at 147. The Court concluded that ERISA did not authorize recovery of extra-contractual damages, since " '[t]he presumption that a remedy was deliberately omitted from a statue is the strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement.' " *Id.* (quoting *Northwest Airlines, Inc. v. Transport Workers,* 451 U.S. 77, 97 (1981)). The Court further warned: " '[W]here a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it.' " *Id.* (quoting *Transamerica Mortgage Advisors, Inc. v. Lewis,* 444 U.S. 11, 19 (1979)). Although overlooked by Petitioners, these principles are directly controlling in the present case.[12]

Petitioners' attempts to subvert *Russell* through references to federal common law and traditional trust principles must fail. In enacting ERISA, Congress did not intend that statute to federalize the entire common law of trusts; instead, Congress intended that trust law principles

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[12] In this Court's subsequent decisions, the *Russell* principles have been repeatedly cited with approval and given deference. *See Ingersoll-Rand Co. v. McClendon,* 111 S.Ct. 478, 485 (1990); *Pilot Life Ins. Co. v. Dedeaux,* 481 U.S. 41, 53-54, 57 (1987). Thus, those decisions do not limit *Russell,* as petitioners intimate; rather, they must be read in conjunction with *Russell.*

be used by courts as a source for interpreting the trust law terms contained within ERISA.[13]

Indeed, this is exactly the manner in which this Court has used the common law of trusts. *See Firestone Tire and Rubber Co. v. Bruch,* 489 U.S. 101, 110 (1989) (in determining the appropriate standard of review for actions under § 1132(a)(1)(B), the Court noted it was guided by principles of trust law since "ERISA abounds with the language and terminology of trust law"); *Massachusetts Mutual Life Ins. Co. v. Russell,* 473 U.S. 134, 152 n.6 (1985) (Brennan, J. concurring) ("the principles of fiduciary conduct are adopted from existing trust law, but with modifications appropriate for employee benefit plans"); *Central States v. Central Transport, Inc.*, 472 U.S. 559, 570 (1985) ("Congress invoked the common law of trusts to define the general scope of [fiduciary] authority and responsibility"). This Court has never used the common law of trusts to infer an entirely new cause of action not present in ERISA.

This Court has noted in *dicta* that federal courts have the power to develop a federal common law of ERISA to provide relief that is not specifically enumerated in

[13] *See, e.g.*, S. Rep. No. 127, 93d Cong., 2d Sess. 29, *reprinted in* 1974 U.S.C.C.A.N. 4639, 4865. ("The fiduciary responsibility section, in essence, codifies and makes applicable to . . . fiduciaries certain principles developed in the evolution of the law of trusts"); H.R. Rep. No. 533, 93d Cong., 2d Sess. 11, *reprinted in* 1974 U.S.C.C.A.N. 4639, 4649 (identical language); *id.* at 13, *reprinted in* 1974 U.S.C.C.A.N. 4639, 4651 ("The principles of fiduciary conduct are adopted from existing trust law, but with modifications appropriate for employee benefit plans").

§ 502(a), 29 U.S.C. § 1132(a). *Ingersoll-Rand Co. v. McClendon,* 111 S.Ct. 478, 486 (1990). However, petitioners' citation to *Ingersoll* for the notion that federal courts may infer entirely new causes of action is misplaced. In *Ingersoll,* the Court considered whether ERISA preempted an employee's state common law wrongful discharge claim. *Id.* at 481. The state law action conflicted directly with an explicit ERISA cause of action found in Section 510, 29 U.S.C. § 1140. *Id.* at 484-85. This Court did not infer a new cause of action into ERISA; it merely found that federal courts may provide relief under ERISA that is not explicitly enumerated in the text of the statute. *Id.* at 486. It would be another matter entirely for the federal courts to infer a completely new cause of action which is contrary to expressed Congressional intent. Such a result is barred by this Court's seminal decision in *Cort v. Ash,* 422 U.S. 66 (1975).[14]

[14] Under the four factor analysis set forth *Cort v. Ash,* no private damage action against non-fiduciaries should be implied here. Although two of the factors support Petitioners' claim (i.e., petitioners are members of the class for whose benefit the statute was enacted and there is no state law impediment to implying a remedy due to ERISA's broad preemptive provision), the remaining two factors require a contrary result. Neither the legislative intent nor the consistency of the legislative scheme support the inference of a private cause of action. 422 U.S. at 78. As this Court concluded in *Northwest Airlines, Inc. v. Transport Workers,* 451 U.S. 77 (1981), "unless this Congressional intent can be inferred from the language of the statute, the statutory structure or some other source, the essential predicate for implication of a private remedy simply does not exist." *Id.* at 94.

III. THE CASES CITED BY PETITIONER TO CREATE A CONFLICT AMONG THE CIRCUITS ARE DISTINGUISHABLE FROM THE DECISION BELOW.

Although Petitioners argue that the Ninth Circuit's ruling in this case conflicts with reported decisions from the Second, Sixth, Seventh and D.C. Courts of Appeals, they never discuss the facts or analyze the results of those cases to demonstrate that conflict.[15] A proper examination of the decisions establishes that there is, in fact, no conflict among the circuits on the Question Presented here. None of the decisions are well-considered, all pre-date OBRA and either pre-date or ignore this Court's recent ERISA decisions.

A. The Sixth Circuit

The most recent of the purportedly conflicting cases cited by Petitioner is *Brock v. Hendershott*, 840 F.2d 339 (6th Cir. 1988). In *Brock*, the Secretary of Labor brought an action against two union representatives who personally profited from the use of their union positions to influence the selection of dental programs by various locals. *Id.* at 341. The Sixth Circuit affirmed the district court's summary judgment in favor of the Secretary of Labor and directed both representatives to disgorge their profits. *Id.* at 340.

Brock does not conflict with the decision below for several reasons. First, *Brock* was filed by Secretary of Labor, not by plan participants. *Id.* Second, the action sought equitable relief in the form of restitution, not damages. *Id.* at 341. Third, defendants in *Brock* were union representatives who personally profited from their own wrongdoing, not service providers, such as Hewitt, performing statutorily mandated functions. One of the union representatives was a fiduciary, and it was "unclear" whether the other defendant also qualified as an ERISA trustee. *Id.* at 342. The Court never resolved the factual fiduciary question because it summarily concluded that a non-trustee "may be held liable . . . for aiding and assisting [a trustee] and furthering his breach of fiduciary duty." *Id.* Thus, Petitioners cannot seriously suggest that the Sixth Circuit has even considered, much less fully analyzed the very different Question Presented here.

B. The Second Circuit

Petitioners also apparently rely on the Second Circuit's decision in *Lowen v. Tower Asset Management, Inc.*, 829 F.2d 1209 (2d Cir. 1987), to establish their alleged conflict. In *Lowen*, the trustees of a pension plan filed suit

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[15] Petitioners also cite *Whitfield v. Lindemann*, 853 F.2d 1298 (5th Cir. 1988), *cert. denied sub nom. Klepak v. Dole*, 490 U.S. 1089 (1989), although they make no explicit claim that this Fifth Circuit case conflicts with the decision below. In *Whitfield*, the Labor Department brought suit against a pension plan trustee and his attorney for violations of fiduciary duty in connection with the trustee's acceptance of over valued assets in settlement of claims by the trust against former trustees. *Id.* at 1301-02. The Fifth Circuit concluded, without any analysis, that the attorney, although not a statutory fiduciary, was "jointly liable . . . as a non-fiduciary who knowingly participated in a breach of trust." *Id.* at 1303. The case does not conflict with the decision here because the Court did not consider (and was not asked to decide) whether ERISA contemplated a damage action by *plan participants and beneficiaries* (as opposed to the Labor Department) against non-fiduciaries.

against their corporate investment manager, a related investment banking corporation, a broker-dealer corporation and their common individual owners. *Id.* at 1211-12. The district court granted summary judgment for the trustees, holding that defendants had violated ERISA's prohibited transaction provisions "by causing the investment of approximately $30 million of the Plan's assets in companies in which one or more of the defendants owned an interest and/or from which one or more defendants received fees or other consideration." *Id.* at 1212. The Second Circuit affirmed. *Id.*

The prohibited transaction allegations set *Lowen* apart from the decision below. It is well settled, even in the Ninth Circuit, that a non-fiduciary who also qualifies as a "party in interest" under ERISA may be held liable for prohibited transactions. *Nieto v. Ecker,* 845 F.2d 868, 873 (9th Cir. 1988). Petitioners could not state such a claim against Hewitt.[16] Accordingly, the ruling in *Lowen* is not in conflict with that of the Ninth Circuit here.

C. The District of Columbia Circuit

In *Fink v. National Savings & Trust Co.,* 772 F.2d 951 (D.C. Cir. 1985), retirement plan beneficiaries brought suit against the plan's trustees to enforce their rights to benefits under the plan and to remedy breaches of fiduciary duty. *Id.* at 953. The district court entered summary

[16] The count of Petitioners' Complaint which claimed "unlawful party-in-interest transactions" was dismissed and not appealed. (PA25-26.)

judgment in favor of the trustees, but the District of Columbia Circuit reversed and remanded. *Id.*

Fink is patently distinguishable because the issue of non-fiduciary liability was never presented in that case. Like the courts in *Brock* and *Lowen,* the D.C. Circuit noted that whether a particular defendant (who served as an initial *trustee,* not as a service provider) "may be said to have acted as a fiduciary is a disputed issue." *Id.* at 958. As a result, the Court remanded the question of that defendants' liability "as [a] cofiduciar[y]." *Id.* The Court's passing reference that "a district court may award relief against non-fiduciaries who knowingly participate in a breach of trust" is nothing more than gratuitous *dicta. Id.* The significant developments in the law since *Fink* was decided, as well as the absence of any analysis of the Question Presented in this case prevent *Fink* from raising any legitimate conflict with the decision below.

D. The Seventh Circuit

Petitioners' reliance on the ten year old decision by the Seventh Circuit in *Thornton v. Evans,* 692 F.2d 1064 (7th Cir. 1982) is similarly inapposite. Plaintiffs in *Thornton* were beneficiaries of a union welfare fund. *Id.* at 1065. They filed suit against various corporations and their attorneys to recover damages allegedly suffered as a result of a conspiracy to defraud the fund of millions of dollars through an insurance scam. *Id.* The district court dismissed the corporate defendants on the pleadings and entered summary judgment for the attorneys. *Id.* The Seventh Circuit reversed, noting that "even though plaintiffs have failed to state a claim against these defendants

as fiduciaries within the meaning of ERISA, they may still have a claim under ERISA on the theory that the defendants conspired with parties who are fiduciaries to breach the duties imposed by ERISA." *Id.* at 1078.

The Seventh Circuit's decision in *Thornton* does not squarely address the Question Presented here. Although several Thornton defendants were service providers, they were not performing statutorily mandated functions, as Respondent was in this case. *Id.* at 1065-66. Moreover, the Seventh Circuit relied heavily upon a district court case which inferred an ERISA cause of action against non-fiduciaries on the basis of trust law principles. *See Freund v. Marshall & Ilsley Bank,* 485 F. Supp. 629 (W.D. Wis. 1979). The rulings in both *Freund* and *Thornton* significantly pre-date this Court's decisions in *Russell* and its progeny as well as Congressional action on OBRA. Accordingly, *Thornton* provides little, if any, support for an argument that the Seventh and Ninth Circuits are currently in conflict on the Question Presented here.[17]

[17] The recent Seventh Circuit decision in *Pappas v. Buck Consultants, Inc.*, 923 F.2d 531 (7th Cir. 1991) does not suggest otherwise. In that case, although the Seventh Circuit acknowledged the *Thornton* decision without comment or analysis, the Court concluded that a plan trustee's allegations of "incorrect advice" and "misleading reports" were "insufficient to state a claim for inducement by a non-fiduciary of a breach of fiduciary duties." *Id.* at 542.

CONCLUSION

For these reasons, the petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

WILLIAM J. MERTENS, ALEX W. BANDROWSKI, JAMES E. CLARKE and RUSSELL FRANZ, Plaintiffs, v. HEWITT ASSOCIATES, an Illinois Partnership; KAISER STEEL RETIREMENT PLAN; and PENSION BENEFIT GUARANTY CORPORATION, as statutory trustee of the Kaiser Steel Retirement Plan, Defendants.	No. C 89 4475 SC COMPLAINT FOR DECLARATORY, INJUNCTIVE AND MONETARY RELIEF UNDER ERISA (CLASS ACTION) (JURY TRIAL DEMANDED) (Filed Dec. 18, 1989)

I. JURISDICTION

1. This action for declaratory, injunctive and monetary relief is brought pursuant to § 502(a)(3) of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1132(a)(3), and the Declaratory Judgment Act, 28 U.S.C. § 2201. Plaintiffs also invoke the Court's pendent jurisdiction over their state law cause of action for professional negligence.

II. THE PARTIES

2. Plaintiff WILLIAM J. MERTENS resides in Concord, County of Contra Costa, State of California.

3. Plaintiff ALEX W. BANDROWSKI resides in Napa, County of Napa, State of California.

4. Plaintiff RUSSELL FRANZ resides in Upland, County of San Bernardino, State of California.

5. Plaintiffs, and each of them, are retired, former salaried employees of Kaiser Steel Corporation ("Kaiser"), a Delaware corporation. Each plaintiff is a "participant" (within the meaning of ERISA § 3(7), 29 U.S.C. § 1002(7)) in the Kaiser Steel Retirement Plan ("PLAN"), a defined benefit pension plan established by Kaiser on or about 1977 which was terminated in October, 1986, by the PENSION BENEFIT GUARANTY CORPORATION ("PBGC") pursuant to the distress termination procedures of ERISA § 4041(c), 29 U.S.C. § 1341.

6. At all relevant times, defendant KAISER STEEL RETIREMENT PLAN ("PLAN") was a "defined benefit plan" within the meaning of ERISA § 3(35), 29 U.S.C.

§ 1002(35), and subject to the minimum funding standards imposed by ERISA § 302, 29 U.S.C. § 1082.

7. Upon information and belief, defendant HEWITT ASSOCIATES ("HEWITT") is a partnership established under the laws of the State of Illinois and doing business in the State of California. At all times relevant herein, HEWITT was an "enrolled actuary" within the meaning of ERISA § 3042, 29 U.S.C. § 1242, and regulations promulgated thereunder, and a "party-in-interest" as to the PLAN within the meaning of ERISA § 3(14), 29 U.S.C. § 1002(14).

8. Defendant PENSION BENEFIT GUARANTY CORPORATION ("PBGC") is a wholly-owned United States government corporation created by ERISA § 4002, 29 U.S.C. § 1302, to administer the pension plan termination insurance program established by Title IV of ERISA. PBGC is sued herein as a necessary party in its capacity as statutory trustee of the PLAN. Upon information and belief, there may arise a conflict between plaintiffs and defendant PBGC with respect to any monies recovered herein for the PLAN.

FACTS COMMON TO ALL CLAIMS

9. At all times relevant herein, HEWITT performed all actuarial work on behalf of the PLAN mandated by ERISA and regulations promulgated thereunder. Upon information and belief, Kaiser retained HEWITT on behalf of the PLAN and paid for its services.

10. Commencing in early 1980, Kaiser changed the basic nature of its business. The Company's radical

restructuring culminated in the curtailment and virtual elimination of its steel-making operations.

11. Among other effects, the change in the nature of Kaiser's business resulted in a substantial increase in the number of participants who retired from the Company with an entitlement to unreduced early retirement benefits under the terms of the PLAN.

12. The sharp increase in unreduced early retirements (and related events) imposed material increases in the PLAN's funding costs which were not reflected in the actuarial assumptions developed by HEWITT for the PLAN.

13. Nevertheless, throughout the period of the Company's radical transformation, HEWITT failed on an ongoing basis to change the actuarial assumptions so as to reflect the material increases in the PLAN's funding costs associated with the high number of early retirements.

14. Had HEWITT employed proper actuarial assumptions, then Kaiser would have been obligated to make substantially higher contributions in order to properly fund the PLAN.

15. Upon information and belief, HEWITT performed actuarial services for Kaiser at the same time that it performed services to the PLAN. Upon further information and belief, HEWITT's services to Kaiser related to its obligations to fund the PLAN.

16. Upon information and belief, at no time did HEWITT make full disclosure of its professional relationship with Kaiser, and any potential conflicts associated therewith, to the PLAN's fiduciaries or administrator.

17. Moreover, at no time did HEWITT disclose the material funding inadequacies and the implications thereof in any certificate or other writing which it was obligated to prepare on behalf of the PLAN.

18. As a consequence of HEWITT's acts and omissions, Kaiser failed to make the requisite contributions into the PLAN. The PLAN's assets became insufficient to satisfy its benefit commitments, including the commitments to pay plaintiffs and members of their class their fully vested pensions.

19. In October, 1986, the PBGC determined the PLAN to be severely underfunded and incapable of paying its liabilities, including the full early retirement monthly pension benefits owed to plaintiffs and other similarly situated PLAN participants and beneficiaries. Accordingly, pursuant to the distress termination procedures of ERISA § 4041(c), 29 U.S.C. § 1341, the PBGC terminated the PLAN and began paying plaintiffs and other PLAN participants and beneficiaries substantially reduced monthly pension benefits.

20. Upon termination of the PLAN, the PBGC became the statutory trustee of the PLAN pursuant to ERISA § 4042, 29 U.S.C. § 1342.

21. Before PBGC terminated the PLAN, plaintiff WILLIAM J. MERTENS received a monthly pension benefit in the amount of $2,016.00. Now, he receives only a

$521.00 monthly pension benefit. Before the PLAN was terminated, plaintiff ALEX W. BANDROWSKI received $1,907.00 monthly, but now receives only $670.00 as a monthly pension. Plaintiff JAMES E. CLARKE previously received $2,567.00 monthly, but now receives only $1,103.00 as a monthly pension. Plaintiff RUSSELL FRANZ previously received $1,426.00 monthly, but now receives only $478.00 as a monthly pension.

22. As a result of the underfunding of the PLAN and its termination, plaintiffs and other similarly situated PLAN participants and beneficiaries all now receive substantially less than their entitlements to full early retirement pension benefits.

23. Information regarding the repeated meetings and other occasions when HEWITT's actuaries, employees and agents exercised defendant's fiduciary duties regarding the Kaiser Steel Retirement Plan, or could and should have exercised those duties, is particularly within the knowledge of HEWITT.

24. The acts, omissions and breaches of professional obligations to the PLAN as alleged herein include the ongoing failure of HEWITT to exercise due care, skill, prudence and diligence in employing actuarial methods and assumptions appropriate to the conditions created by the restructuring of Kaiser.

III. CLASS ACTION ALLEGATIONS

25. Plaintiffs bring this action on behalf of themselves and as a class action under the provisions of Rule

23 of the Federal Rules of Civil Procedure on behalf of all members of the class, defined as follows:

> All persons, other than defendants in *Mertens, et al. v. Kaiser Steel Retirement Plan, et al.*, Civil No. C-88-3587-MHP, who are, or have been, participants in or beneficiaries of the PLAN, and whose PLAN benefits were eliminated or reduced as a consequence of the acts and omissions alleged herein.

26. The requirements for maintaining this action as a class action under F.R.Civ.P. 23(a), (b)(1) and (b)(2), are satisfied in that:

> (a) There are numerous class members who are participants or beneficiaries of the PLAN. Their exact number and identities are currently unknown to plaintiffs; but, upon information and belief, approximately 175 participants and beneficiaries constitutes the class.

> (b) The members of the class are so numerous that joinder of all members is impracticable.

> (c) There are questions of law and fact common to the class, which questions relate to the existence and scope of defendants' duties, actions, and omissions herein alleged.

> (d) Plaintiffs are members of said class; their claims are typical of the claims of the class members and they will fairly and adequately protect the interests of the class. The interests of plaintiffs are coincident with, and not adverse to, those of the remainder of the class. Plaintiffs are represented by attorneys who have specialized in ERISA litigation.

(e) The prosecution of separate actions by individual members of the class would create a risk of inconsistent or varying adjudications establishing incompatible standards of conduct for HEWITT and a risk of adjudications which, as a practical matter, would be dispositive of the interests of other members who are not parties.

(f) HEWITT has acted, and refused to act, on grounds generally applicable to the class, thereby making appropriate final injunctive and other equitable relief with respect to the class as a whole.

FIRST ERISA CAUSE OF ACTION

[Breach of Professional Duties to PLAN]

27. Plaintiffs incorporate Paragraphs 1 through 26 as though fully set forth herein.

28. As the PLAN's actuary, HEWITT was subject to the requirements imposed by ERISA, including:

A. ERISA § 302(c)(3), 29 U.S.C. § 1082(c)(3), which provides:

> For purposes of this part, all costs, liabilities, rates of interest, and other factors under the plan shall be determined on the basis of actuarial assumptions and methods which, in the aggregate, are reasonable (taking into account the experience of the plan and reasonable expectations) and which, in combination, offer the actuary's best estimate of anticipated experience under the plan.

B. ERISA § 103(a)(4)(B), 29 U.S.C. § 1023(a)(4)(B), which provides:

> The enrolled actuary shall utilize such assumptions and techniques as are necessary to enable him to form an opinion as to whether the contents of the matters reported under subsection (d) of this section –
>
> (i) are in the aggregate reasonably related to the experience of the plan and to reasonable expectations; and
>
> (ii) represent his best estimate of anticipated experience under the plan.
>
> The opinion by the enrolled actuary shall be made with respect to, and shall be made a part of, each annual report.

C. ERISA § 103(d), 29 U.S.C. § 1023, which required, in relevant part:

> (8) A statement by the enrolled actuary –
>
> (A) that to the best of his knowledge the [actuarial] report is complete and accurate, and
>
> (B) the requirements of section 302(c)(3) (relating to reasonable actuarial assumptions and methods) have been complied with.
>
> * * *
>
> (10) A statement by the enrolled actuary which discloses:
>
> (A) any event which the actuary has not taken into account, and
>
> (B) any trend which, for purposes of the actuarial assumptions used, was not assumed to continue in the future,

> but only if, to the best of the actuary's knowledge, such event or trend may require a material increase in plan costs or required contribution rates.
>
> * * *
>
> (13) Such other information as may be necessary to fully and fairly disclose the actuarial position of the plan.

29. In addition to the foregoing statutory requirements, HEWITT was at all times under an affirmative duty to adhere to regulations defining standards of performance of actuarial services as promulgated by the Joint Board for the Enrollment of Actuaries (JBEA), pursuant to its authority under ERISA § 3042, 29 U.S.C. § 1242.

30. The applicable JBEA regulations imposed *specific* standards of professional conduct on HEWITT, including:

> (b) *Professional duty.* An enrolled actuary shall not perform actuarial services for any person or organization which he/she believes or has reasonable grounds for believing may utilize his/her services in a fraudulent manner or in a manner inconsistent with law.
>
> * * *
>
> (d) *Conflicts of interest.* In any situation in which the enrolled actuary has a conflict of interest with respect to the performance of actuarial services, of which the enrolled actuary has knowledge, he/she shall not perform such actuarial services except after full disclosure has been made to plan trustees, any named fiduciary of the plan, the plan administrator, and, if the plan is subject to a collective bargaining agreement, the collective bargaining representative.

> (e) *Assumptions, calculations and recommendations.* The enrolled actuary shall exercise due care, skill, prudence and diligence to ensure that:
>
> (1) The actuarial assumptions are reasonable in the aggregate and the actuarial cost method and the actuarial method of valuation of assets is appropriate.
>
> (2) The calculations are accurately carried out, and
>
> (3) The report, any recommendations to the plan administrator and any supplemental advice or explanation relative to the report reflect the results of the calculations.
>
> (f) *Report or certificate.* An enrolled actuary shall include in any report or certificate stating actuarial costs or liabilities, a statement or reference describing or clearly identifying the data, any material inadequacies therein and the implications thereof, and the actuarial methods and assumptions employed.

(ERISA Regs. § 901.20, 42 FR 39204.)

31. In addition, under IRS REG. § 1.412(c)(1)-1, HEWITT had a duty to the PLAN to choose actuarial assumptions appropriate to the funding method selected by Kaiser. HEWITT had no legal right to delegate that responsibility to Kaiser or to allow Kaiser to select or impose actuarial assumptions of its own choosing.

32. Nevertheless, upon information and belief, HEWITT either delegated the responsibility to Kaiser for selecting the PLAN's actuarial assumptions or allowed Kaiser to impose its choice of assumptions. Upon further information and belief, HEWITT did so in order not to jeopardize its lucrative professional relationship with Kaiser.

33. By the acts and omissions described herein, HEWITT breached each of the foregoing ERISA provisions and applicable regulations relating to its professional obligations to the PLAN.

34. As a direct and proximate result, the PLAN became severely underfunded with the consequence that plaintiffs and their class have lost their fully earned vested retirement benefits.

35. Upon information and belief, HEWITT failed to employ proper actuarial assumptions so as to allow Kaiser to avoid paying higher contributions into the PLAN and in order to pursue its lucrative business relationship with Kaiser. Therefore, in committing the acts and omissions set forth herein, HEWITT acted intentionally, maliciously and/or with wanton indifference to the integrity of the PLAN and the rights of plaintiffs and their class, thereby justifying an award of punitive damages.

SECOND ERISA CAUSE OF ACTION

[Unlawful Party-In-Interest Transactions]

36. Plaintiffs incorporate paragraphs 1 through 26 and 28 through 35 as though fully set forth herein.

37. ERISA § 406(a)(1)(C), 29 U.S.C. § 1106(a)(1)(B), prohibits transactions involving a direct or indirect lending of money or other extension of credit between a plan and a party-in-interest.

38. ERISA § 406(a)(1)(C), 29 U.S.C. § 1106(a)(1)(C), prohibits transactions involving a direct or indirect furnishing of goods, services, or facilities between a plan and a party-in-interest.

39. ERISA § 408(b), 29 U.S.C. § 1108(b), exempts service providers to ERISA plans from the prohibitions of Section 406 " . . . if no more than reasonable compensation is paid . . . " for the services.

40. Because it breached its obligations, duties and responsibilities to the PLAN, failed to exercise due care, skill, prudence and diligence in the performance of its duties, and provided services to Kaiser in conflict to its obligations to the PLAN, HEWITT's compensation was not reasonable. Accordingly, by receiving compensation for the services it provided PLAN, HEWITT committed a prohibited transaction in violation of ERISA § 408.

PRAYER FOR RELIEF UNDER ERISA

WHEREFORE, on the First and Second Causes of Action, plaintiffs, pursuant to ERISA § 502(a)(3), pray that the Court:

A. Grant declaratory relief to the effect that HEWITT breached the duties, obligations and responsibilities imposed on it by ERISA and JBEA Regulations;

B. Declare that HEWITT failed to assure that the PLAN met the minimum funding standards imposed by ERISA § 302, 29 U.S.C. § 1082.

C. Grant judgment against HEWITT and order it to make good to the PLAN, plaintiffs and their class any and all losses to the PLAN resulting from its breaches of ERISA;

D. Grant judgment for punitive damages;

E. Grant judgment for pre-judgment interest;

F. Appoint a fiduciary for the PLAN to receive all funds restored by HEWITT and to distribute and/or pay benefits out of such restored funds to plaintiffs and their class;

G. Declare the respective rights of plaintiffs and their class and the defendant PBGC to any funds restored to the PLAN;

H. Grant judgment for the costs of suit herein and plaintiffs' attorneys' fees, pursuant to ERISA § 502(g), 29 U.S.C. § 1132(g); and,

I. Grant such other and further legal and equitable relief as the Court deems appropriate.

THIRD CAUSE OF ACTION

(Professional Negligence Under California Law)

41. Plaintiffs incorporate Paragraphs 1 through 26 and 28 through 35 as though fully set forth herein.

42. During all relevant times, HEWITT has held itself out to the public and to the PLAN as a qualified enrolled actuary for ERISA-regulated employee benefit plans, with the requisite degree of skill and knowledge

necessary to assure that client-plans are maintained in compliance with all applicable law.

43. At all times relevant herein, HEWITT had an agreement whereby HEWITT, on a fee basis, agreed to perform and purported to perform all actuarial work on behalf of the PLAN mandated by ERISA and regulations promulgated thereunder.

44. By entering into the agreement described herein, HEWITT impliedly represented and warranted that in carrying out its responsibilities to the PLAN, it would use due care, skill, prudence and diligence. Said representation was made for the benefit of plaintiffs and their class in their capacities as the PLAN's participants and beneficiaries.

45. Nevertheless, HEWITT, in performing its actuarial services, failed to take into account the radical restructuring of Kaiser and related corporate events. Thus, HEWITT did not employ reasonable actuarial assumptions in the aggregate and, among other acts and omissions, failed to properly consider the impact on the PLAN's funding of the Company's radical restructuring.

46. Moreover, upon information and belief, HEWITT failed to advise the PLAN's fiduciaries of its employment by Kaiser and consequent conflict of interest regarding its services to the PLAN.

47. As a direct and proximate result of the HEWITT's professional malpractice as alleged herein, the PLAN became severely underfunded, thus preventing plaintiffs and other PLAN participants and beneficiaries

from receiving their fully earned vested retirement pension benefits.

48. In committing the acts and omissions set forth herein, HEWITT acted intentionally, maliciously and/or with wanton indifference to the rights of plaintiffs and other PLAN participants and beneficiaries, thereby justifying an award of punitive damages.

PRAYER FOR RELIEF REGARDING PENDENT STATE LAW CLAIM

WHEREFORE, plaintiffs prays [sic]:

A. For all damages according to proof;

B. For costs of suit incurred herein;

C. For punitive damages according to proof;

D. For such other and further relief as may be deemed just and proper.

Dated: December 18, 1989

Respectfully submitted,

SIGMAN & LEWIS

ANDREW THOMAS SINCLAIR

By: /s/ Stephen Bingham
Stephen Bingham

DEMAND FOR A JURY TRIAL

Plaintiffs hereby demand a jury trial as provided for in F.R.Civ.P. 38.

Dated: December 18, 1989

Respectfully submitted,

SIGMAN & LEWIS

ANDREW THOMAS SINCLAIR

By: /s/ Stephen Bingham
Stephen Bingham